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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

NO. 80-6277

ROSE HARRIS,

Appellant,

v.

GERALD FUERST,

Appellee.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Appellant Rose Harris hereby seeks leave to file the attached Jurisdictional Statement to appeal a final judgment from the Supreme Court of Ohio without prepayments of costs and to proceed in forma pauperis hereto. Attached to this motion is Appellant's affidavit of poverty.

ROBERT S. CATZ

Cleveland State University
College of Law
Cleveland, Ohio 44115
(216) 687-2525

Counsel for Appellant

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AFFIDAVIT

I, ROSE HARRIS, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees: 1. I am an appellant in the above-entitled case. 2. Because of my poverty, I am unable to pay the costs of said cause. 3. I am unable to give security for the same. 4. I believe I am entitled to the redress I seek in said cause. 5. The nature of said cause is stated briefly, as follows:

Appellant appeals from a decision of the Supreme Court of Ohio, dismissing an action seeking to declare an unconstitutional court rule which requires indigents to pay publication fees in a divorce case.

Rose M. Harris
ROSE HARRIS

Duly witnessed and sworn to before me, a Notary Public, this 13th day of January, 1981.

Patricia F. Keenan
PATRICIA F. KEENAN
NOTARY PUBLIC Notary Public, State of Ohio - Cuyo. Cty.
My Commission Expires April 22, 1985

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No. 80-

ROSE HARRIS,

Appellant,

vs.

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

ROBERT S. CATZ
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COUNSEL FOR APPELLANT

March 1981

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-

ROSE HARRIS,

Appellant,

vs.

GERALD E. FUERST,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

QUESTION PRESENTED

Whether court rules adopted pursuant to state statute requiring prepayment of publication costs as a prerequisite to the filing of an action for divorce or dissolution of the marital relationship unconstitutionally restrict an indigent's access to state courts.

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	1
Statutes and Rules Involved	2
Nature of the Statutory Scheme Involved	3
Statement of Case	6
Raising the Federal Question	8
The Federal Question is Substantial	10
Conclusion	14
Certificate of Service	15
Appendix	1a

TABLE OF AUTHORITIES

Cases

Ashley v. Superior Court, 509 P.2d 751 (Wash. 1973)	10
Boddie v. Connecticut, 401 U.S. 371 (1971)	passim
Brown v. Brown, 296 A.2d 898 (N.H. 1972)	10
Cohen v. Board of Superiors, 97 Cal. Rptr. 550 (Cal. App. 1971)	13
Conley v. Gibson, 355 U.S. 41 (1957)	8
Craig v. Harvey, 331 U.S. 367 (1947)	9
Deason v. Deason, 296 N.E. 2d 299 (N.Y. 1973)	11
Dungan v. Dungan, 579 S.W. 2d 183 (Tenn. 1979)	12
Grissom v. Dade County, 293 So. 2d 59 (Fla. 1974)	10
Hart v. Superior Court, 492 P.2d 433 (Ariz. App. 1971)	11
Johnson v. Stevens, 265 S.E. 2d 764 (W.Va. 1980)	10
King v. King, 316 N.E. 2d 555 (Ill. App. 1974)	10
NAACP v. Alabama, 377 U.S. 449 (1958)	8
Napue v. Illinois, 360 U.S. 264 (1959)	9
Norris v. Alabama, 294 U.S. 587 (1935)	9
Oregon v. Hass, 420 U.S. 714 (1971)	9
State ex rel. Heller v. Miller, 399 N.E. 2d 66 (Ohio 1980)	9

IN THE

SUPREME COURT OF THE UNITED STATES

ROSE HARRIS,

Appellant,

vs.

GERALD E. FUERST,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

Appellant Rose Harris appeals from the final judgment of the Supreme Court of Ohio entered December 17, 1980, dismissing an original complaint for mandamus which challenges the constitutionality of court rules that require prepayment of publication costs as a prerequisite to the filing of actions for divorce, effectively denying indigents access to the courts.

OPINION BELOW

The opinion of the Supreme Court of Ohio, attached hereto, in reported at 64 Ohio St. 2d 128, 413 N.E. 2d 826 (1980).

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on December 17, 1980. A notice of appeal was filed on January 20, 1981. This appeal is being docketed in this Court within 90 days from the date of judgment. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

STATUTES AND RULES INVOLVED

Ohio Revised Code §2701.09

> In any county in which a daily law journal is printed, the judges of the courts of record, other than the court of appeals, shall jointly designate such daily law journal as the journal in which shall be published all calendars of the courts of record in such county, which calendars shall contain the numbers and titles of causes, and names of attorneys appearing therein, together with the motion dockets and such particulars and notices respecting causes, as may be specified by the judges, and each notice required to be published by any of such judges.
>
> In all cases, proceedings, administrations of estates, assignments, and matters pending in any of the courts of record of such counties in which legal notices or advertisements are required to be published, such law journal shall, once a week and on the same day of the week, publish an abstract of each such legal advertisement, but the jurisdiction over, or irregularity of, a proceeding, trial, or judgment shall not be affected by anything therein.
>
> For the publication of such calendars, motion dockets, and notices, the fees for which are not fixed by law, the publisher of the paper shall receive a sum to be fixed by the judges for each case brought, to be paid in advance by the party filing the petition, transcripts for appeal, or lien, to be taxed in the costs and collected as other costs. For the publication of abstracts of legal advertising such publisher shall receive a sum to be fixed by judges for each case, proceeding, or matter, in which such advertising is had, to be taxed and collected as a part of the costs thereof.

Ohio Revised Code §3105.06

> If the residence of a Defendant in an action for divorce, annulment, or alimony is unknown, or if the Defendant is not a resident of this state or is a resident of this state but absent from the state, notice of the pendency of the action must be given by publication as provided by the Rules of Civil Procedure.

Rule 4.4 of the Ohio Rules of Civil Procedure

> (A) When the residence of a defendant is unknown, service shall be made by publication in actions where such service is authorized by by law. . . .

Rule 7 of the Court of Common Pleas of Cuyahoga County

(A) No civil action or proceeding shall be accepted for filing unless the party offering the same for filing shall have first deposited a sum to secure the payment of the costs that may accrue in such action or proceeding, except as otherwise provided by law.

Service by publication . . . . . $ 35.00

Rule 14 of the Court of Common Pleas of Cuyahoga County

(a) The "Daily Legal News and Cleveland Recorder," a daily law journal, is hereby designated as the official publication of this court. All official and legal notices required by law or ordered by the court to be published shall be published in said daily law journal. For the publication of such notices, the publisher of said daily law journal shall receive Five Dollars ($5.00) for each case brought, to be paid in advance by the party filing a complaint, transcript for appeal or lien, to be taxed in the costs and collected as other costs and as provided in R.C. §2701.09.

(b) The publisher of the daily law journal shall receive the sum of Three Dollars ($3.00) for each entry the daily law journal is required by law to publish in the "abstract" and the Clerk of Courts shall tax as costs the sum of Three Dollars ($3.00) for each such entry made.

NATURE OF THE STATUTORY SCHEME INVOLVED

Appellant contends here, as she did before the Ohio Supreme Court, that the Rules of the Cuyahoga County Court of Common Pleas adopted pursuant to a state statute prevent her from exercising fundamental rights guaranteed by the U.S. Constitution, Amendment XIV, §1, and by this Court's holding in Boddie v. Connecticut, 401 U.S. 371 (1971).

The statutory scheme which forms the basis for the denial of federal substantive rights in this case begins with the grant of power to the Court of Common Pleas to hear divorce actions where there has been "willful absence of the adverse party for one year." Ohio Rev. Code §3105.01(B). The divorce action must be brought

pursuant to the local rules of the Court of Common Pleas in "the proper county for commencement of the action." Ohio Rev. Code §3105.03. Under Rule 3(A), Ohio Rules of Civil Procedure, "A civil action is commenced by filing a complaint with the Court." Ohio statute provides that "[T]he clerk of the Court of Common Pleas shall file together and carefully preserve in his office all papers delivered to him for that purpose in every action or proceeding." Ohio Rev. Code §2303.09.

Further statutory provision for publication requires that:

> In any county in which a daily law journal is printed, the judges of the courts of record, other than the court of appeals, shall jointly designate such daily law journal as the journal in which shall be published all calendars of the courts of record in such county, which calendars shall contain the numbers and titles of causes, and names of attorneys appearing therein, together with the motion dockets and such particulars and notices respecting causes, as may be specified by the judges, and each notice required to be published by any of such judges.
>
> In all cases, proceedings, administrations of estates, assignments, and matters pending in any of the courts of record of such counties in which legal notices or advertisements are required to be published, such law journal shall, one a week and on the same day of the week, publish an abstract of each such legal advertisement, but the jurisdiction over, or irregularity of, a proceeding, trial, or judgment shall not be affected by anything therein.
>
> For the publication of such calendars, motion dockets, and notices, the fees for which are not fixed by law, the publisher of the paper shall receive a sum to be fixed by the judges for each case brought, to be paid in advance by the party filing the petition, transcripts for appeal, or lien, to be taxed in the costs and collected as other costs. For the publication of abstracts of legal advertising such publisher shall receive a sum to be fixed by judges for each case, proceeding, or matter, in which such advertising is had, to be taxed and collected as a part of the costs thereof.

Ohio Rev. Code §2701.09.

Pursuant to this statute the Rules of the Court of Common Pleas for Cuyahoga County under Rule 14(A),(B) provide:

(A) The "Daily Legal News and Cleveland Recorder," a daily law journal, is hereby designated as the official publication of this court. All official and legal notices required by law or ordered by the court to be published shall be published in said daily law journal. For the publication of such notices, the publisher of said daily law journal shall receive Five Dollars ($5.00) for each case brought, to be paid in advance by the party filing a complaint, transcript for appeal or lien, to be taxed in the costs and collected as other costs and as provided in R.C. §2701.09.

(B) The publisher of the daily law journal shall receive the sum of Three Dollars ($3.00) for each entry the daily law journal is required by law to publish in the "abstract" and the Clerk of Courts shall tax as costs the sum of Three Dollars ($3.00) for each such entry made.

Ohio Rev. Code §3105.06 unambiguously requires that the publication in a divorce action where the residence of the defendant is unknown and cannot be ascertained upon diligent search and inquiry, shall be handled as provided by the Rules of Civil Procedure. Under Rule 4.4(A) of the Ohio Rules of Civil Procedure:

> When the residence of a defendant is unknown, service shall be made by publication in actions where such service is authorized by law.

Finally, under Rule 7(A) of the Rules of the Court of Common Pleas for Cuyahoga County:

> No civil action or proceeding shall be accepted by the Clerk for filing unless the party or parties offering the same for filing shall have first deposited a sum to secure the payment of the costs that may accrue in such action or proceeding, except as otherwise provided by law.

The cost of service by publication is $35.00. Under this statutory scheme there is no mechanism for the waiver of publication costs for indigents in divorce actions or an alternative mode of substitute service, such as service at a defendant's last known address by mail and the posting of notice at the courthouse for a set period.

STATEMENT OF CASE

Appellant Rose Harris has been denied the ability to divorce her husband, Leon Harris, who abandoned her in January, 1969. Since his departure Mrs. Harris has cared for their two dependent children both of whom reside with her. An indigent, her sole source of income is $263.00 in monthly AFDC benefits. For the past two years Mrs. Harris has been attempting to surmount the procedural obstacles which prevent her from securing a divorce. Appellant Harris has been denied the right to dissolve her marital relationship because the state has permitted her inability to pay the service of process costs of publication to completely bar her access to the divorce courts.

On April 20, 1979, appellant's counsel went to the Office of the Clerk of the Court of Common Pleas of Cuyahoga County and was advised by the deputy clerk of the Court of Common Pleas, that publication fees in divorce proceedings were mandatory and that the clerk could neither waive the fees nor pay an indigent's fees for publication.

Appellant subsequently filed an action under 42 U.S.C. §1983 in the United States District Court for the Northern District of Ohio in which she sought to have Ohio Revised Code §3105.06, Ohio Rules of Civil Procedure, Rule 4.4 and Cuyahoga County Court of Common Pleas Rules 7 and 14, declared invalid and to enjoin enforcement of the statute and rules as applied in a manner that denies indigents the right to terminate marital relationships solely because of their inability to pay publication costs, contrary to Boddie v. Connecticut, 401 U.S. 371 (1971). This case was dismissed by the district court on December 18, 1979 on the ground of ripeness and on the ground of the availability of an adequate state judicial remedy. (See attached order.)

On January 14, 1980 appellant's counsel, following the district court's dismissal order, proceeded again to the office of the Clerk of the Cuyahoga County Court of Common Pleas and attempted to file a complaint for divorce, along with a supporting affidavit of poverty. A deputy clerk instructed counsel that since the whereabouts of the defendant were unknown plaintiff was required to pay for publication costs in the Daily Legal News before she could file her complaint. The publication fees could not be waived despite appellant's showing of indigency. Specifically, in accordance with Rules 7 and 14 of the Cuyahoga Court of Common Pleas, the clerk refused to accept and file appellant's complaint for divorce. In short, appellant attempted to file her complaint and was not permitted to do so without first advancing the required costs of publication as required by Rules 7 and 14.

On July 22, 1980 appellant Harris filed an original complaint for writ of mandamus in the Ohio Supreme Court. The complaint challenged the constitutionality of Rules 7 and 14 as applied to indigents and requested the court to compel the clerk of the Court of Common Pleas for Cuyahoga County to accept and file a complaint for divorce as required by the Court's decision in Boddie v. Connecticut, 401 U.S. 371 (1971), and to provide a mode of substitute service for indigents by either ordering the county to pay for publication costs or by permitting service at a defendant's last known address and posting of notice at the courthouse for a set period.

On December 17, 1980, the Supreme Court of Ohio dismissed Appellant Harris' complaint for mandamus.

This appeal follows.

RAISING THE FEDERAL QUESTION

Appellant expressly raised the claim that the Ohio statutory scheme that requires payment of publication costs violates the Due Process Clause of the fourteenth amendment as applied to indigents in divorce proceedings in the original complaint for writ of mandamus filed with the Supreme Court of Ohio.

The judgment of the Supreme Court of Ohio purports to rest on an adequate and independent state ground. However, in dismissing appellant's complaint for mandamus the court based its decision on a misconstruction of the facts alleged in the complaint. Appellant alleged that the appellee, pursuant to Local Rules 7 and 14 of the Cuyahoga County Court of Common Pleas, refused to accept the complaint for divorce unless appellant first advanced publication costs. In denying appellant relief, the court, noted that "[i]n fact she [appellant] was given the right to file her complaint without paying the fee," and "after filing her complaint . . . she merely had to request a waiver from the proper [divorce] court . . . . 413 N.E. 2d at 828. (Emphasis added) This curious holding disregards the factual allegations, and thus rests on an untenable state ground since appellant could hardly request waiver "from the proper court" after the complaint was filed since appellant alleged that the clerk refused to accept the complaint for filing unless the costs for publication were tendered in advance.[1]

This Court has jurisdiction to review the federal question as it was fairly presented below and as denial rests upon an inadequate and untenable state ground. The Court has always recognized a duty to determine whether the state court's reliance on a non-federal ground adequately and independently supports the judgment, NAACP v. Alabama, 357 U.S. 449 (1958) and to

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[1] It is of course the "accepted rule" regarding standards for dismissal that a court must accept the alleged facts as true. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

review a state court's judgment by an independent examination of the facts when necessary to decide whether a person has been deprived by a state court of a right secured by the Constitution. Norris v. Alabama, 294 U.S. 587, 590 (1935); Craig v. Harvey, 331 U.S. 367, 373-374 (1947); and Napue v. Illinois, 360 U.S. 264, 271-272 (1959).

Finally, in dismissing appellant's complaint for an original writ of mandamus, the lower court expressed some reservation concerning the application of this Court's holding in Boddie.

> Relator [appellant] bases her claim for relief on Boddie v. Connecticut, 401 U.S. 371 (1971). Although Boddie may mandate that relator should be able to seek a divorce without the necessity of paying publication fees, relator must fail in this action since she has improperly chosen the use of an extraordinary remedy to pursue her requested relief. (Emphasis added)

413 N.E. 2d at 827.

As this Court has previously noted, "the fact the (state) court found it necessary to attempt to distinguish (another Supreme Court decision) reveals the federal basis." Oregon v. Hass, 420 U.S. 714, 719-720 (1971).

With regard to the lower court's holding that appellant has chosen to "improperly" pursue mandamus relief, it should be noted that an original complaint for writ of mandamus which raises federal constitutional claims in the Supreme Court of Ohio is a proper remedy. State ex rel. Heller v. Miller, 61 Ohio St. 2d 6, 399 N.E. 2d 66 (1980).

THE FEDERAL QUESTION IS SUBSTANTIAL

The right to access to the divorce courts has been recognized as fundamental by this Court in Boddie v. Connecticut, 401 U.S. 371 (1971). The Court recognized in that case that the indigency of a plaintiff may not bar his or her access to state court for the purpose of obtaining a divorce:

> Our conclusion is that, given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages. (emphasis added)

Id. at 374.

The fundamental doctrine set forth in Boddie is that the fourteenth amendment to the United States Constitution forbids a state from "requiring payment of court fees and expenses as a condition precedent to obtaining court relief . . . " Id. at 373. Fees and expenses for service of process by newspaper publication are encompassed by the doctrine.[2]

> [W]e think that reliable alternatives exist to service of process by a state-paid sheriff if the State is unwilling to assume the cost of official service. This is perforce true of service by publication which is the method of notice least calculated to bring to a potential defendant's attention the pending of judicial proceedings . . . We think in this case service at the defendant's last known

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[2]For decisions holding that fees and expenses of publication costs are covered by Boddie: see, Ashley v. Superior Court, 509 P.2d 751 (Wash. 1973); Brown v. Brown, 296 A.2d 898 (N.H. 1972); Grissom v. Dade County, 293 So. 2d 59 (Fla. 1974); Taylor v. Clymer, 503 S.W. 2d 53 (Mo. App. 1973); King v. King, 316 N.E. 2d 555 (Ill. App. 1974); Johnson v. Stevens, 265 S.E. 2d 764 (W.Va. 1980).

> address by mail and posted notice is equally effective as publication in a newspaper (citations omitted).

Id. at 382.

In the aftermath of this Court's decision in Boddie, several state courts have either required the costs of service by publication to be paid by the county or permitted posting of notice as an alternative method of substitute service. In Hart v. The Superior Court, 492 P. 2d 433 (Ariz. App. 1971), the court ordered the divorce court to authorize the cost of publication because the defendant's whereabouts were unknown and under the Arizona Rules of Civil Procedure, said service was mandatory. The court stated:

> We are obliged to afford the petitioner complete access to the legal relief required in Boddie.

Id. at 435.

Regarding who should pay the costs of service by publication for indigent persons, the court of appeals in Deason v. Deason, 32 N.Y. 2d 93, 296 N.E. 2d 299 (1973) held:

> Boddie did not, of course, decide whether state or local government should bear publication costs. However, whether viewed as an appropriate charge of litigation expenses on the indigent, the burden seems applicable, in the absence of legislation, to the local government.

Id. at 95.

The courts in Hart, and Deason, had no difficulty applying Boddie to publication costs. In those cases the courts ordered payment of newspaper publication fees to clear the way for the divorce actions.

While it is clear from Boddie that due process prohibits denial of access solely because of one's inability to pay state imposed fees, the particular means which the states must use

in affording indigents access is not mandated. One common alternative to payment by state or county governments is expressly suggested by this Court:

> We think in this case service at the defendant's last known address by mail and posted notice is equally effective as publication in a newspaper (citations omitted).

401 U.S. at 382.

A number of courts have authorized this alternative to newspaper publication, or have declared their local court rules requiring newspaper publication unconstitutional where the state required payment from an indigent divorce plaintiff. Several post Boddie cases have followed the suggested path of ordering states to provide indigents access to the courts by mandating an alternative method of constructive service of process other than by publication.

In Dungan v. Dungan, 579 S.W. 2d 183 (Tenn. 1979), indigent plaintiff requested a waiver of the service by publication fees where such service was mandatory under local civil rules. The court ordered an alternative method of constructive service of process other than publication.

> We are of the opinion that of the two options open to the Courts as a result of the Boddie mandate, constructive service of process by registered mail and posting of Notices is the appropriate course for Tennessee . . . We have an affirmative duty under both the United States Constitution and the Constitution of Tennessee to open the Courts to bona fide indigents seeking, in good faith, the judicial dissolution of their marriages.
>
> * * * *
>
> [U]pon Motion, supported by Affidavit, trial judges may, in the exercise of sound discretion, order in lieu of publication, that the clerk mail a copy of the complaint and summons by return receipt registered mail to Defendant's last known address and post a copy of the summons at three public places in the county. . . .

Id. at 185.

Similarly, in Thompson v. Thompson, 286 N.E. 2d 657 (Ind. 1972) the Supreme Court of Indiana, held:

> We also perceive that there are alternatives open to trial courts when faced with the practical problem of providing publication of a summons for indigent persons. For instance, a trial court has authority . . . , to provide alternative forms of constructive notice so long as they meet the requirements of due process.

Id. at 663.

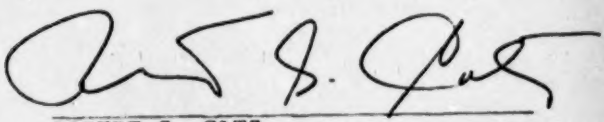
Several other lower courts have ordered alternative means of service other than service by publication in Boddie type cases. See, e.g., Cohen v. Board of Supervisors, 97 Cal. Rptr. 550 (Cal. App. 1971) (posting and service at last known address).

Full implementation of the Boddie doctrine prohibiting " . . . a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages," 410 U.S. at 374, is impossible given Ohio's statutory and rule requirements for constructive service where, as here, the residence of the defendant is unknown.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal and summarily reverse the judgment of the Supreme Court of Ohio on the authority of Boddie v. Connecticut, 401 U.S. 371 (1971).

Respectfully submitted,



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COUNSEL FOR APPELLANT

March 2, 1981

THE STATE, EX REL. HARRIS, *v.* FUERST, CLERK OF COURT.

[Cite as State, ex rel. Harris, v. Fuerst (1980), 64 Ohio St. 2d 130.]

Mandamus—Cause dismissed, when—Divorce complaint—Refusal of indigent to pay publication fees—Adequate remedy available.

(No. 80-1014—Decided December 17, 1980.)

IN MANDAMUS.

On January 14, 1980, counsel for relator, Rose Harris, went to the office of Gerald E. Fuerst, Clerk of the Court of Common Pleas of Cuyahoga County, respondent herein, with the intention of filing a complaint in divorce. Pursuant to R. C. 2701.09 and Rules 7 and 14 of the Court of Common Pleas of Cuyahoga County, fees are to be paid in conjunction with the necessary publication in the local daily law journals concerning relator's divorce complaint. Neither relator, an indigent, nor her attorneys, would tender the prepayment of those fees. Further, relator neither applied for nor received, a judicial waiver, available to all, of the fees based on her indigency.

She filed an action in United States District Court for the Northern District of Ohio (*Rose Harris* v. *James A. Rhodes, et al.*, case No. C79-1082), seeking declaratory and injunctive relief which, *inter alia*, would declare unconstitutional the requirement of paying the applicable publication fees when the divorce complaint is filed by an indigent person. That action was dismissed by the federal court and an appeal is presently pending in United States Sixth Circuit Court of Appeals.

Relator also filed this original action in mandamus requesting that a writ issue directing respondent to accept relator's complaint without the payment of the publication fees.

The cause is now before this court upon relator's motion for summary judgment, and upon respondent's motion to dismiss the complaint.

Per Curiam. In order to be entitled to a writ of mandamus, relator must establish (1) that she has a clear legal right to the relief prayed for, (2) that the respondent is under a clear legal duty to perform the requested act, and (3) that relator does not have a plain and adequate remedy in the ordinary course of the law. *State, ex rel. Harris,* v. *Rhodes,* (1978), 54 Ohio St. 2d 41.

Relator bases her claim for relief on *Boddie* v. *Connecticut* (1971), 401 U. S. 371. Although *Boddie* may mandate that relator should be able to seek a divorce without the necessity of paying the publication fees, relator must fail in this action since she has improperly chosen the use of an extraordinary writ to pursue her requested relief.

Relator's action in federal District Court was dismissed because relator, according to the decision in that case, "* * * was not injured as a result of any Ohio statute or rule, in fact she was given the right to file her complaint without paying a fee. After filing her complaint, * * * [relator] merely had to request a waiver from the proper court." Similarly, this action will be dismissed since there is an adequate remedy at law available to relator.

This court cannot and will not condone relator's unwarranted use of an extraordinary remedy by lending its imprimatur to this cause when there was not only an adequate, but also an expedient, remedy available to relator.

For the foregoing reasons, respondent's motion for dismissal is sustained and the cause is dismissed.

Cause dismissed.

CELEBREZZE, C. J., W. BROWN, P. BROWN, SWEENEY, LOCHER, HOLMES and DOWD, JJ., concur.

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, EX REL. ROSE HARRIS, Relator, -vs- GERALD E. FUERST, Respondent.	)	NO. 80-1014

NOTICE OF APPEAL

Comes now Rose Harris and hereby gives notice that she hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on the 17th day of December, 1980. This appeal is taken pursuant to 28 U.S.C. §1257(2).

Respectfully submitted,

DATED: January 14, 1981

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(216) 687-2525

COUNSEL FOR RELATOR

FILED
JAN 20 1981
SUPREME COURT OF OHIO
THOMAS L. STARTZMAN, CLERK

Filed 12/18/79

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROSE HARRIS, et al.,	:	C79-1082
Plaintiff	:	
-vs-	:	ORDER
JAMES A. RHODES, et al.,	:	
Defendants	:	

Battisti C.J.

Plaintiff has brought this action to declare invalid and enjoin the enforcement of Section 3105.06 of the Ohio Revised Code and Rule 4.4 of the Ohio Rules of Civil Procedure as applied in a manner which denies indigent plaintiffs from securing a divorce because of their inability to pay the costs of service by publication. Section 3105.06 reads:

> If the residence of a defendant is an action for divorce, annulment, or alimony is unknown, notice of the pendency of the action must be given by publication as provided by the rules of civil procedure.

Rule 4.4 reads in part:

> When the residence of the defendant is unknown, service shall be made by publication in actions where such service is authorized by law.

Neither Section 3105.06 nor Rule 4.4 provide for substituted service of process. In this case, service by publication is a pre-requisite to a divorce when the residence of the defendant is unknown and cannot be ascertained.

Plaintiff is an indigent with two children. Her only source of income is $235.00 per month which she receives from "Aid to Families with Dependent Children." Plaintiff has been separated from her husband for approximately ten years and now seeks to obtain a divorce from him. She does not know where her husband resides, and has been unable to ascertain his residence. Plaintiff could not afford to pay the $35.00 fee required in Cuyahoga County for service by publication and, therefore, declined to file her complaint for divorce.

This action raises no justiciable case or controversy as plaintiff has suffered no injury. Plaintiff has equated her case with that of Boddie v. Connecticut, 401 U.S. 371 (1971), however Boddie can be distinguished. In Boddie plaintiff was required to pay an initial filing fee plus a service of process fee. Plaintiff, an indigent, filed an action before the Connecticut courts seeking a waiver of the fees, but her request for the waiver was denied. In the instant case, plaintiff neither filed her complaint nor did she seek a waiver before any Ohio court. Section 2323.31 of the Ohio Revised Code provides for an indigent to file a complaint without paying a filing fee. Therefore, plaintiff was entitled to file her complaint, yet she neglected to do so claiming she could not afford the service of process fee.

Plaintiff would have been entitled to obtain a waiver in court if she had filed her complaint. The case of Monroe v. Monroe, 33 O.Misc. 23, 294 N.E. 2d 250 (C.P. Hamilton County 1972), provides for an adequate remedy at state law. Monroe was a divorce action where plaintiff moved for the waiver of a $29.95 service by publication fee. Plaintiff's sole source of income was from Aid to Families with Dependent Children. The court held that the fees would be waived after she presented an affidavit evidencing her inability to pay. In the instant case, plaintiff never attempted to obtain a waiver of her fee in any Ohio court.

Plaintiff's failure to file her complaint coupled with the fact that an adequate remedy was available in the state courts leads this court to conclude that there is no justiciable case or controversy. Plaintiff has failed to properly initiate her divorce action. Because her action was never initiated, she could not have been denied her right to obtain a divorce. Plaintiff was not injured as a result of any Ohio statute or rule, in fact she was given the right to file her complaint without paying a fee. After filing her complaint, plaintiff merely had to request a waiver from the proper court. This court cannot render

P-043-B

advisory opinions. Plaintiff must demonstrate that she suffered an injury and no such injury is evident. This case is hereby dismissed.

IT IS SO ORDERED.

Frank J. Battisti

Chief Judge

P-043-B

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

Case No. 80-6277

ORIGINAL COPY

ROSE HARRIS,

Relator-Appellant,

-vs-

GERALD E. FUERST, CLERK OF THE
COMMON PLEAS COURT OF CUYAHOGA COUNTY

Respondent-Appellee

MOTION TO DISMISS APPEAL

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-6277

ROSE HARRIS, Relator-Appellant	)	
-vs-	)	MOTION TO DISMISS
GERALD E. FUERST, Respondent-Appellee	)	

Now comes the respondent-appellee, Gerald E. Fuerst, Clerk of the Common Pleas Court of Cuyahoga County, Ohio, by and through his attorneys, John T. Corrigan, Prosecuting Attorney of Cuyahoga County, Thomas P. Gill and Patrick Carroll, Assistant Prosecuting Attorneys, and respectfully move this Honorable Court to dismiss this appeal. For the reasons stated in appellee's accompanying memorandum in support of this motion, which is incorporated herein by reference, appellee submits that this is not within the jurisdiction of the Court, as set out in 28 U.S.C. §1257(2), and therefore, the appeal should be dismissed in accordance with the provisions of Rule 16.1(b) of the Rules of the Supreme Court of the United States.

Respectfully submitted,

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of Cuyahoga County, Ohio

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

Case No. 80-6277

ROSE HARRIS,

Relator-Appellant,

-vs-

GERALD E. FUERST, CLERK OF THE
COMMON PLEAS COURT OF CUYAHOGA COUNTY

Respondent-Appellee.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS APPEAL

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TABLE OF CONTENTS

Table of Authorities ii

Motion to Dismiss 1

Statement of the Case 1

Statement of Facts 2

Law and Argument

WHEN A PROCEEDING IN MANDAMUS IS DISMISSED IN THE STATE COURT BEFORE THE FEDERAL QUESTION WAS REACHED AND THE DECISION OF THE STATE COURT WAS BASED ON AN INDEPENDENT NON-FEDERAL GROUND, THE NONPREVAILING PARTY MAY NOT INVOKE THE APPELLATE JURISDICTION OF THIS COURT PURSUANT TO 28 U.S.C. 1257(2) 5

Conclusion 11

Certificate of Service 12

Appendix - Statutes Cited 13

TABLE OF AUTHORITIES

Cases

Monroe v. Monroe, 33 Ohio Misc. 23, 294 N.E.2d 250 (C.P. 1972) 3,6,7

State, ex rel.Akron Coal Co. v. Muskingum Watershed Conservancy Dist., 136 Ohio St. 485, 26 N.E.2d 766 (1940) 9

State, ex rel. Alford v. Willoughby, 58 Ohio St. 221,231, 390 N.E.2d 782,789 (1979) 8

State, ex rel. Bennet v. Lime, 55 Ohio St.2d 62, 378 N.E.2d 152 (1978) 7,8

State, ex rel. Dollision v. Reddy, 55 Ohio St. 2d 49, 378 N.E.2d 150 (1978) 7

State, ex rel. Harris v. Rhodes, 54 Ohio St.2d 41, 374 N.E.2d 641 (1978) 5

State, ex rel. Johnson v. Industrial Comm., 144 Ohio St. 57, N.E.2d 775 (1944) 9

Wainwright v. Sykes, 433 U.S. 72 (1977) 9

Statutes

Ohio Rev. Code §2731.01 5

Ohio Rev. Code §2731.02 5

Ohio Rev. Code §2731.03 5,7

Ohio Rev. Code §2731.04 5

Ohio Rev. Code §2731.05 5

Ohio Rev. Code §3105.06 2

Other

28 U.S.C. §1257(2) 1,5,10

Rule 4.4, Ohio Rules of Civil Procedure 2

STATEMENT OF THE CASE

This appeal arises out of an order of the Ohio Supreme Court dismissing the petition of Rose Harris, relator-appellant, for a writ of mandamus. State, ex rel. Harris, v. Fuerst, 64 Ohio St.2d 128, 413 N.E.2d 826 (1980). The appellant filed her petition for a writ of mandamus on July 22, 1980. In her petition the appellant alleged that in seeking to obtain a divorce she was unconstitutionally restricted from access to the State Court as a result of being required to pay the costs for service by publication. As the Ohio Supreme Court noted, the appellant did not attempt to obtain a waiver of the publication costs in the Domestic Relations Court. Consequently, because of the existence of an adequate remedy at law, the Court held that mandamus was not the proper remedy, and therefore, the proceeding in mandamus should be dismissed. In dismissing the mandamus proceeding the Ohio Supreme Court did not reach or in any way determine the merits of the constitutional issue which the appellant attempted to raise in her petition for the writ of mandamus.

STATEMENT OF FACTS

Relator-appellant, Rose Harris (hereinafter referred to as appellant), commenced this action by filing a petition for a writ of mandamus in the Supreme Court of Ohio on July 22, 1980. In her petition the appellant alleged that she had been a resident of Cuyahoga County, Ohio, for at least six months. According to the allegations in her petition, the appellant was married on December 26, 1962 and was abandoned by her husband in January, 1969. The appellant is currently seeking a divorce from her husband. The appellant, however, does not know the residence of her husband and has not been able to locate him.

Section 3105.06 of the Ohio Revised Code states that if the residence of a defendant in a divorce action is unknown, notice of the pendency of the action shall be given by publication as provided by the rules of procedure. Rule 4.4 of the Ohio Rules of Civil Procedure sets out the steps to be taken to perfect service by publication.

Local Rule 14 of the Rules of the Common Pleas Court of Cuyahoga County (hereinafter referred to as Local Rule _____) provides that a cost of five dollars ($5.00) must be paid with the filing of a complaint in a civil action. This five dollar cost pays for the publication of the notice and abstract of the action in the Daily Legal News. Local Rule 7 provides that a cost of thirty-five dollars ($35.00) must be paid with the clerk in those actions in which service of process is obtained by publication. This money is forwarded to the Daily Legal News to pay for the cost of publication for the six week period required by Civil Rule 4.4. The local rules of Court do not give the clerk of courts any authority to waive either of the above mentioned publication costs.

The appellant alleged in her petition that she is a welfare

recipient, receiving monthly benefits of approximately two hundred sixty-three dollars ($263.00). It was further alleged in this petition that the appellant's attorneys went to the respondent's office in January, 1980, to file the appellant's complaint for divorce. The appellant's attorneys did not tender the specified deposit to cover the cost of service by publication, as required by Local Rule 7. Rather, the appellant's attorneys attempted to waive this cost by filing an affidavit of indigency. Although the Clerk of Courts has the authority to waive all filing fees upon the filing of an affidavit of indigency, there is no authority, either by statute or Rule of Court, by which the Clerk may waive the payment of the costs for service by publication.

Prior to the filing of the petition for a writ of mandamus, the appellant had raised the same issues against the same defendant (appellee herein), by way of declaratory judgment in the Federal District Court for the Northern District of Ohio. This action was dismissed by the Trial Court and is currently pending review in the United States Court of Appeals (6th Cir.). In dismissing the declaratory judgment action the District Court held that the appellant had an adequate remedy in the state court by obtaining a waiver of the publication costs in the State Trial Court. As the District Court noted, the procedure of how such waiver could be obtained was set out in Monroe v. Monroe, 33 Ohio Mis. 23, 294 N.E.2d 250 (C.P. 1972). In addition to the adequate state remedy, the District Court also held that because the appellant did not actually attempt to file her divorce complaint, she had not been denied a right to do so, and therefore, her complaint for declaratory judgment failed to raise a justiciable case or controversy.

To date, the appellant has not attempted to obtain a waiver of the publication costs in the Domestic Relations Division of the Common Pleas Court, the Court in which the appellant's divorce action

would be determined. Rather, the appellant commenced this action in the Supreme Court of Ohio to compel the Clerk of Courts to waive the publication costs. The Ohio Supreme Court held that the appellant had an adequate remedy at law, and therefore, had failed to satisfy the requirements for the issuance of a writ of mandamus. Having failed to meet the requisite elements for a writ of mandamus, the Ohio Supreme Court dismissed the proceeding. In doing so the Court did not rule on the federal question which was raised in the appellant's petition for a writ of mandamus.

LAW AND ARGUMENT

WHEN A PROCEEDING IN MANDAMUS IS DISMISSED IN THE STATE COURT BEFORE THE FEDERAL QUESTION WAS REACHED AND THE DECISION OF THE STATE COURT WAS BASED ON AN INDEPENDENT NON-FEDERAL GROUND, THE NONPREVAILING PARTY MAY NOT INVOKE THE APPELLATE JURISDICTION OF THIS COURT PURSUANT TO 28 U.S.C. §1257(2).

The appellant attempts to invoke the appellate jurisdiction of this Court pursuant to 28 U.S.C. §1257(2); that is, that the Local Rules of Court for the Common Pleas Court of Cuyahoga County are repugnant to the Constitution. A review of the record in the lower court reflects, however, that although a federal question was raised in the appellant's petition for a writ of mandamus, the federal question was not considered by the Court. Rather, the proceeding was dismissed on the basis of an independent state issue which is adequate to support the lower Court's judgment. Consequently, appellee respectfully submits that 28 U.S.C. §1257(2) is not applicable in the present case, and therefore, this appeal should be dismissed.

A proceeding in mandamus is a special statutory procedure which is governed by Chapter 2731 of the Ohio Revised Code. In order to prevail in a proceeding in mandamus, the relator must establish that (1) she has a clear legal right to the relief sought; (2) the respondent is under a clear legal duty to perform the requested act; and (3) the relator does not have a plain and adequate remedy in the ordinary course of the law. Ohio Rev. Code §§ 2731.01, 2731.05. See also, State, ex rel. Harris v. Rhodes, 54 Ohio St.2d 41, 374 N.E.2d 641 (1978). In addition, a writ of mandamus will not lie to control judicial discretion. Ohio Rev. Code §2731.03.

With respect to the third requirement for a writ of mandamus, the record reflects and the Ohio Supreme Court noted that the appel-

lant had an adequate remedy in the ordinary course of the law by way of application to the Domestic Relations Court for a waiver for the payment of publication costs. The procedure for the waiver of such costs was set out by an Ohio Court in Monroe v. Monroe, 33 Ohio Misc. 233, 294 N.E.2d 230 (C.P. 1973). In Monroe, similar to the underlying action in the present case, the plaintiff in a divorce action alleged that she was indigent, and therefore, was unable to pay the cost for service by publication. The plaintiff in Monroe filed a motion with the trial court for a waiver of the publication costs. The trial court granted the plaintiff's motion and ordered the county to pay the publication costs.

The decision in Monroe, supra, is important for a number of reasons. To begin with, the decision sets out that the appellant has an adequate remedy at law. In the present case the appellant did not allege that she sought a waiver for the costs for service by publication by the trial court. Thus, the appellant failed to establish that this alternative remedy in the ordinary course of the law was not adequate.

In addition to the existence of an adequate remedy in the ordinary course of the law, the opinion in Monroe, supra, also illustrates that the decision to waive the costs for service by publication is one to be made by the trial court, not the Clerk of the Court. The decision in Monroe points to the fact that mere conclusionary statements contained in an affidavit of indigency may not be sufficient to show that the plaintiff is entitled to waive the publication costs. Rather, judicial inquiry into the plaintiff's ability to pay may be conducted before a decision is made whether or not to waive the publication costs. Moreover, as was stated earlier, the local rules of Court provide the Clerk of the Court with no authority by which he could order the publication costs waived. Thus, not only is the clerk of the court not under a clear affirma-

tive duty to waive the costs for service by publication for an indigent, but also, the decision to allow a waiver of such costs would fall within the bounds of judicial discretion. The decision in Monroe established that the appellant in the present case has an adequate remedy at law and that in the absence of an order of the trial court permitting a waiver of publication costs, the clerk of the court is not under a clear legal duty to allow the waiver of these costs. Therefore, on the basis of the Court's opinion in Monroe, supra, the appellant failed to establish two of the requisite elements for a writ of mandamus. In addition, as an attempt to control judicial discretion, the relief sought by the appellant was beyond the scope of the statutory limitation governing mandamus proceedings. Ohio Rev. Code §2731.03.

As was noted by the Ohio Supreme Court in its opinion dismissing the appellant's petition, prior to the initiation of the mandamus proceeding, the appellant raised the same issue in the Federal District Court by way of declaratory judgment. Rose Harris v. James A. Rhodes, et al., Case No. 80-3109 (N.D. Ohio). Appellee Fuerst was also a defendant in the Federal declaratory judgment action. This case was dismissed by the District Court on the grounds of lack of standing by the plaintiff as well as the existence of an adequate remedy in the State Court by way of judicial waiver of publication costs. Currently, the Federal action is pending in the United States Court of Appeals (6th Cir.).

The issue of whether or not the availability of a declaratory judgment action constitutes an adequate remedy at law was addressed by the Ohio Supreme Court in State, ex rel. Dollision v. Reddy, 55 Ohio St.2d 59, 378 N.E.2d 150 (1978) and State, ex rel. Bennet v. Lime, 55 Ohio St.2d 62, 378 N.E.2d 152 (1978). In both Reddy and Lime the Ohio Supreme Court stated that while the mere existence of a declaratory judgment action as an alternative remedy

is not, by itself, sufficient to permit a court to deny a petition for a writ of mandamus, the court may, in the exercise of its discretion, determine that such an alternate remedy does in fact constitute an adequate remedy at law. The primary issue, therefore, is not whether the appellant may pursue a declaratory judgment action, but rather, whether such an alternative remedy is adequate. Cf., State, ex rel. Alford v. Willoughby, 58 Ohio St.221, 231, 390 N.E.2d 782, 789 (1979).

In Lime, supra, the relators filed a petition for a writ of mandamus seeking to recover back pay as police officers while they were on active duty as members of the United States Active Reserve. The reported decision in this case reflects that two of the three relators had already commenced an action for declaratory judgment against the same parties and seeking the same relief in the Common Pleas Court. 55 Ohio St.2d at 63, 378 N.E.2d at 153. On appeal, the Ohio Supreme Court held that the appellate Court did not abuse its discretion in determining that a declaratory judgment action, which the relators had already pursued, constituted an adequate remedy at law, thereby justifying the denial of the petition for a writ of mandamus. As the Ohio Supreme Court stated in the syllabus in Lime,

> "Where parties to a mandamus action are also parties, or may be joined as parties, in a previously filed declaratory judgment action involving the same subject matter, a court, in the exercise of its discretion, may refuse to issue a writ of mandamus."

In the present case, similar to the situation in Lime, the appellant has demonstrated the adequacy of a declaratory judgment action as a remedy by commencing such an action in the Federal District Court. Thus, not only does the appellant have an adequate remedy at law by way of declaratory judgment, but also, the appellant has acknowledged this alternative means of relief as an adequate remedy by her actions

in the Federal District Court. Moreover, as the Ohio Supreme Court has stated in the past, a writ of mandamus will not be issued when there is a prior action pending between the same litigants and involving the same subject matter in another court having jurisdiction. See State, ex rel. Akron Coal Co. v. Muskingum Watershed Conservancy Dist., 136 Ohio St. 485, 26 N.E.2d 766 (1940). See also, State, ex rel. Johnson v. Industrial Comm., 144 Ohio St., 57 N.E.2d 775 (1944).

As has been shown above, the record in the present case clearly establishes that the appellant failed to satisfy the necessary requirements for the issuance of a writ of mandamus. This is not a case in which examination and determination of the federal question was precluded in the state Court as a result of the failure to timely raise the federal question. Cf., Wainwright v. Sykes, 433 U.S. 72 (1977). Rather, the appellant has failed to establish that she was entitled to the relief which she sought by way of a proceeding in mandamus. In this respect it should be noted that the appellant has not attacked the Ohio statutory scheme for obtaining a writ of mandamus or the underlying state interest in the operation of this statutory scheme. Moreover, it should be further noted that the original relief sought by the appellant (waiver of publication costs) has not been denied as a result of any procedural obstacles set out by the appellee, but rather, delayed due to the failure of the appellant to follow the instructions of both the Federal District Court and the Supreme Court of Ohio to seek a waiver of the costs for service by publication from the Domestic Relations Trial Court rather than the Clerk of the Court.

The record in the present case reflects that the Ohio Supreme Court did not reach the merits of the federal question which the appellant raised in her pleadings. Rather, the mandamus proceeding was dismissed on the grounds that the appellant's petition did not satisfy all three of the requisite elements for the

issuance of a writ of mandamus, and therefore, failed to state a claim upon which relief could be granted. Such a determination was based on a non-federal ground which was independent of the federal question and this ground was adequate to support the judgment of the State Court. Consequently, appellee respectfully submits that due to the determination of the mandamus proceeding by the Ohio Supreme Court, the appellant has failed to properly invoke the appellate jurisdiction of this Court pursuant to 28 U.S.C. §1257(2), and therefore, the appeal should be dismissed.

CONCLUSION

For the reasons stated above, appellee respectfully submits that the dismissal of the mandamus proceeding by the Ohio Supreme Court did not involve the determination of the federal question raised by the appellant, but rather, was based upon independent and adequate state grounds. Consequently, this appeal should be dismissed for lack of jurisdiction.

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APPENDIX

§ 2731.01 Mandamus defined. (GC § 12283)

Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.

HISTORY: GC § 12283; RS § 6741; S&C 1124; 51 v 57, § 569. Eff 10-1-53.

§ 2731.02 Courts authorized to issue writ; contents. (GC §§ 12284, 12290)

The writ of mandamus may be allowed by the supreme court, the court of appeals, or the court of common pleas and shall be issued by the clerk of the court in which the application is made. Such writ may issue on the information of the party beneficially interested.

Such writ shall contain a copy of the petition, verification, and order of allowance.

HISTORY: GC §§ 12284, 12290; RS §§ 6742, 6747; S&C 1124, 1126; 51 v 57, §§ 569, 571; 77 v 265; 82 v 16, 38; 103 v 406 (433). Eff 10-1-53.

§ 2731.03 Writ does not control judicial discretion. (GC § 12285)

The writ of mandamus may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, but it cannot control judicial discretion.

HISTORY: GC § 12285; RS § 6742; S&C 1124; 51 v 57, § 569; 77 v 265; 82 v 16, 38. Eff 10-1-53.

§ 2731.04 Application for writ. (GC § 12286)

Application for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit. The court may require notice of it to be given to the defendant, or grant an order to show cause why it should not be allowed, or allow the writ without notice.

HISTORY: GC § 12286; RS § 6743; S&C 1127; 51 v 57, § 573. Eff 10-1-53.

§ 2731.05 Adequacy of law remedy bar to writ. (GC § 12287)

The writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of the law.

HISTORY: GC § 12287; RS § 6744; S&C 1126; 51 v 57, § 570. Eff 10-1-53.